

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1128

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

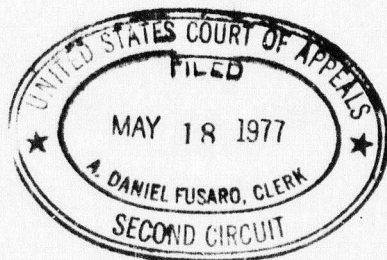
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UNITED STATES OF AMERICA,
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:
Plaintiff-Appellee,
:
:
-against-
:
:
BERNARD MELTZER,
:
:
Defendant-Appellant.
:
:
-----x

Bp/s

Docket No. 77-1128

APPENDIX TO APPELLANT'S BRIEF
PURSUANT TO
ANDERS v. CALIFORNIA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
BERNARD MELTZER
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,
Of Counsel.

15
16

VERMONT

FELONY

PAGINATION AS IN ORIGINAL COPY

- U.S. District Court

Magistrate Assigned

U.S.

76 CR 484

MELTZER, BERNARD

LAST, FIRST, MIDDLE

Case Filed
Mo. 7 Day 29

No. of Defs
* 1

JUVENILE

BRAMWELL, J.

75-7676

76 484 1

U.S. MAG
CASE NO

BAIL • RELEASE

☐ Denied ☐ AMT ☐ Fugitive
☐ Set ☐ Pers. Recog
☐ PSA
\$ 000 conditions
☐ Date ☐ 10% Deposit
☐ Surety Bond
☐ Bail Not Made ☐ Collateral
☐ Status Changed (See Docket) ☐ 3rd Ptry Cust ☐ Other

U.S. TITLE/SECTION
18-1623

OFFENSES CHARGED
Did testify falsely before a Grand Jury

ORIGINAL COUNTS
1

CLOSED

II. KEY DATES & INTERVALS

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL	SENTENCE
U.S. Custody Began	High Risk Date	Information ☐	1st Plea	Disposition of Charges
Summons Served	Indict. Waived ☐	7/29/76	7/30/76	3.11.77
First Appearance	In Charging District	Superseding ☐ Indict/Info ☐	Final Plea	☐ On All Charges ☐ On Lesser * Offense(s) ☐ WOP: ☐ WP ☐ On Government's Motion

MAGISTRATE

DATE	INITIAL/NO	INITIAL APPEARANCE DATE	INITIAL/NO	OUTCOME
Search Warrant Issued		PRELIMINARY EXAMINATION OR REMOVAL HEARING		☐ DISMISSED ☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT ☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW
Summons Issued		☐ WAIVED ☐ NOT WAIVED		
Arrest Warrant Issued		☐ INTERVENING INDICTMENT		
COMPLAINT				
OFFENSE (In Complaint)				

U.S. Attorney or Asst.

ATTORNEYS

Defense ☒ J.A. ☒ Self ☐ None / Other ☐ PD ☐ CD

R. Appleby

Irwin Klein
400 Madison Avenue, - NYC -
421-3400

Edw. Kelly of Legal Aid

Show last names and suffix numbers of other defendants on same indictment information.

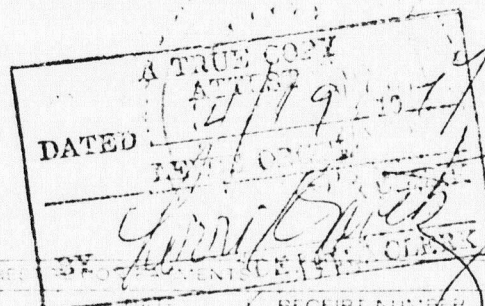
DATE	(DOCUMENT NO.)	PROCEEDINGS	EXCLUDABLE DELAY
7-29-76		Before BRAMWELL, J - Indictment filed - bench warrant ordered/issued.	
7/29/76		Before CHREIN, J. - Deft arraigned & enters a plea of not guilty. Deft to appear on 8/2/76 at 10:00 a.m.	
8-2-76		Notice of appearance filed.	
8-2-76		Before PRATT, J - case called - deft & counsel present - deft arraigned and enters a plea of not guilty - bail contd - adjd to 9-8-76 for criminal status conference.	
8/4/76		Notice of Readiness for trial filed.	
9-8-76		Before Bramwell, J - case called - deft & counsel Irwin Klein present - adjd to Oct. 26, 1976 for trial - bail contd.	
9-29-76		By Bramwell, J - Order appointing counsel filed.	
10-26-76		Before Bramwell, J - case called - deft & counsel present - case adjd to Nov. 10, 1976	
11/10/76		Before BRAMWELL, J. - Case called. Deft and counsel present. Case adjd to 12/8/76 at 10:00 a.m. for trial.	

11/10/76 T -

DATE	DOCUMENT NO.	PROCEEDINGS (continued)	Internal Section (3)	Start Date End Date (b)	1st Code (c)	Total Durs (d)	P. A. L. A.
12-8-76		Before Bramwell, J.- Case Called. Deft. & Counsel present. Case adjd. to 1-17-77 at 10:00 A.M. for trial.					
1-17-77		Before Bramwell, J.- Case Called. Deft. & Counsel present. Trial ordered and begun. Jurors were selected and sworn. Trial continued to 1-18-77 at 10:00 A.M.					
1-18-77		Before Bramwell, J - case called - deft & counsel present - trial resumed - defts motion to dismiss the indictment, etc. motion denied - trial contd to 1-19-77.					
1/19/77		Before BRAMWELL, J.- Case called. Deft & Counsel present. Trial resumed. Deft rests. Defts motion to dismiss indictment, etc, motion denied. AUSA Gould sums up for govt. Order of sustenance signed. Court charges jury. Alternate jurors discharged. Jury came into court at 5:15 p.m. Jury sent home at 5:30 p.m. and trial continued to 1/20/77 at 10:00 a.m.					
1/19/77		By BRAMWELL, J.- Order of sustenance signed for lunch and filed.					
1-20-77		By Bramwell, J - Order of sustenance filed.					
1-20-77		Before BRAMWELL, J - case called - deft & counsel E. Kelly of Legal Aid present - trial resumed - Jury resumes deliberations at 10:40 am. Order of sustenance signed for Lunch - Jury came into court at 2:55 PM and rendered a verdict of guilty as charged. Jury polled and discharged - defts motion to set aside the verdict is denied - trial concluded - bail contd and sentence adjourned without date.					
3.11.77		Before Bramwell, J.- Case Called. Deft. & Counsel present. Deft. sentenced to imprisonment for a period of 3 years. Execution of sentence is suspended and deft. is placed on probation for a period of 3 years as charged. Deft. advised of his right to appeal in forma pauperis.					
3.11.77		Judgment and Order of Probation filed. Certified copies to Probation.					
3-14-77		Notice of appeal filed. Docket entries and duplicate of Notice mailed to the court of appeals.					
3-23-77		Scheduling Order filed that the record on appeal be docketed on or before 4-19-77					
4.18.77		Stenographer's Transcript dated January 19, 1977 filed.					
4/19/77		Stenographers transcript dated 1/20/77 filed.					

tk.

gp



DATE	RECEIPT NUMBER	CD NUMBER	DATE	RECEIPT NUMBER	CD NUMBER

B

TRP:RA:rd
F# 763,005

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

JUL 29 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TIME A.M.
P.M.

----- X
UNITED STATES OF AMERICA

-against-

BERNARD MELTZER,

Defendant.

I N D I C T M E N T

Cr. No.
(T. 18, U.S.C., §1623)

----- X
THE GRAND JURY CHARGES:

76 CR 484

INTRODUCTION

1) On or about December 15, 1975, Joseph Setter was indicted by a United States Grand Jury sitting in the Eastern District of New York for violations of the narcotics laws.

2) On May 26, 1976 the trial of United States v. Joseph Setter, 75 CR 767, commenced in the United States District Court in the Eastern District of New York before the Honorable Henry Branwell, United States District Judge.

3) On May 26, 1975 through May 27, 1976 the Government presented its direct case in which agents of the New York Joint Task Force of the Drug Enforcement Administration testified inter alia that on April 17, 1975, at approximately 5:00 P.M., Joseph Setter sold approximately one-eighth (1/8) kilogram of cocaine to one Harvey Rosenberg, at Setter's residence, located at 54-16 Glenwood Road, Brooklyn, New York.

4) On May 27, 1976 Joseph Setter began his defense case. As part of his defense case he called BERNARD MELTZER as an alibi witness who was duly sworn by a clerk of the United States District Court authorized to administer oaths.

5) It was material to the aforesaid trial to determine whether in fact Joseph Setter was present at the location and time indicated in paragraph three above.

(1)

COUNT ONE

On May 27, 1976, the defendant BERNARD MELTZER appeared as a witness before the aforesaid Court, and then and there, being under oath as aforesaid, testified falsely before the United States District Court and jury with respect to the aforesaid material matters as follows:

Q: And do you recall the date April 17, 1975?

A: Yes, I do.

Q: And do you recall seeing Mr. Setter that day?

A: Yes, I do.

Q: And where was he that day? Where did you see him?

A: He was on the lot and in the office and in the repair shop.

The Court: He was on the lot and in the office and in the repair shop? Is that what you said?

A: Yes.

Q: And for what period of time was he there that you observed him, from when to when?

A: I was there from 8:30. He was there from about quarter to nine in the morning. And I left at 6:30 and he was still there that evening.

Q: He was still there?

A: Yes.

Q: And was he there about a quarter to five on that day?

A: Definitely.

Q: And he was there at 5:00 o'clock?

A: Yes, he was.

Q: And was he there at 5:15?

A: Yes, he was.

Q: And were you positive of that?

A: Positive.

* * * *

Q: And do you recall now that Mr. Setter was present on the premises of Exclusive Motors, would you say from 4:00 to 6:00?

A: Yes, he was. He had to make out the payroll for the following day.

Q: How far - do you know where Mr. Setter lives?

A: Yes, I do.

Q: How much of a distance in time away from Exclusive Motors is his house? I think it's Glenwood Road somewhere.

A: Five to ten minutes.

Q: By car?

A: By car.

Q: Is it possible Mr. Setter during the course of the day, particularly between 4:00 and 6:00 could he have disappeared from your plant---

A: No way.

Q: Exclusive Motors, gone back to his house and stayed at his house for a period of fifteen minutes, which would make a total of fifteen, twenty-five, thirty minutes, could he-- if he had been away for a half an hour -- could he have been away for a half an hour during that period of time?

A: It was an impossibility during that period of time.

Q: You would have noticed it?

A: Yes.

Q: You were in constant observation of him during that period of time?

A: Yes.

The aforesaid testimony of the defendant BERNARD MELTZER, as he then and there well knew and believed, was not true in that on April 17, 1975 at approximately 5:00 P.M. Joseph Setter was not present at Exclusive Motors, located at 790 Utica Avenue, Brooklyn, New York. (Title 18, United States Code Section 1623).

A TRUE BILL

Joyce La Cigna
FOREMAN

David G. Trager
DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

1 131 a

THE COURT: Are you ready to proceed?

2

MR. COULD & MR. KELLY: Yes, we are ready to

3

proceed.

4

THE COURT: Bring in the jury.

5

(At this point the jury enters the courtroom.)

6

THE COURT: I will now give you the charge

7

of the Court. Mr. Foreman, ladies and gentlemen of

8

the jury; we now come to the final stage of the

9

proceedings. The Court will now charge you on the

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law to be applied to the facts in the case.

11

As you may recall, I initially gave you a

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precharge as to the manner in which the case would

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be presented to you. I told you that most of the

14

evidence in the case would come in the form of the

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testimony of witnesses, and that you were to pay

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special attention to the manner in which the

17

witnesses testified.

18

I believe I also instructed you that you

19

would be the judges of the facts in the case, that

20

being your sole province; and that your recollection

21

of the facts after having heard all of the evidence

22

in the case, the testimony of witnesses and the

23

documentary proof, was to control the determination

24

of the issues.

25

Likewise, at that time I told you that I

1 would be the judge of the law. This has not
2 changed at this stage of the proceedings. I will
3 not review the facts in this case for you because
4 I am certain that with summations by the attorneys
5 there is no need for the Court to review the facts.
6 In any event, if you find that there is some fact
7 in the case that you may have forgotten or don't
8 recollect, or you can't agree with each other in
9 your deliberations, you can have it read back
10 from the record, and that will, I am sure, refresh
11 your memory.
12

13 In any event, I am the judge of the law.
14 You must accept what I say to be the law in this
15 case.

16 Now, the attorneys have been permitted
17 by the Court and by the rules to make opening
18 statements and summations to you. Under no
19 circumstances are the statements they have made
20 by way of opening or by way of summation to be
21 taken as evidence. However, the Court and the
22 law does permit you to take the arguments that
23 they have proffered before you and weigh those
24 arguments. If you agree with what they have said
25 on either side of the case, you may use those

arguments in your deliberations and in discussing the case with each other and try to convince one another as to what the final determination shall be with reference to the deliberations at hand.

If you feel that the arguments are not commensurable with the testimony and the proof in the case, you may disregard them. The arguments are not evidence. You need not weigh them. However, there are times when the arguments of the attorneys will give you an insight as to something you may have missed and may discuss that portion of it if you so desire.

Now, of course, I also said to you that during the trial the Court will be the judge of the law. Likewise, as to motions which at times we had as a side bar, as you may recall. That was not for the purpose of keeping any of the proof from you -- there were no side bars I don't believe during this particular trial. In any event, if you feel that you have discovered by some stretch of your imagination what this Court thinks as to either some of the testimony or the case itself, you should remove that from your minds because I tell you here and now I have come to no conclusion

1
2 in this case nor have I indicated to you in any
3 way whatsoever what my feeling is with reference
4 to the facts in the case or with reference to the
5 guilt or innocence of the defendant. That is
6 your province and your job. You should not try
7 to weigh what you believe the Court's impression
8 may be.

9 You must understand that the lawyers who
10 are here before you are advocates. They are
11 advocating the best case they can for the
12 parties they represent and they have a right
13 to exercise as much forcefulness as they desire
14 in their questioning or otherwise in presenting
15 their case. I say this because this is within
16 the framework of the ordinary trial.

17 As to objections and rulings: It is the
18 duty of the attorney on each side of a case to
19 object when the other side offers testimony or
20 other evidence which the attorney believes is
21 not properly admissible. You should not show
22 prejudice against an attorney or his client
23 because the attorney has made objections.

24 Upon allowing testimony or other evidence
25 to be introduced over the objection of an attorney,

1 the Court does not, unless expressly stated,
2 indicate any opinion as to the weight or effect
3 of such evidence. As stated before, the jurors
4 are the sole judges of the credibility of all
5 witnesses and the weight and effect of all
6 evidence.
7

8 When the Court has sustained an objection
9 to a question addressed to a witness the jury
10 must disregard the question entirely and may
11 draw no inference from the wording of it or
12 speculate as to what the witness would have said
13 if he had been permitted to answer any questions.

14 No statement, ruling, remark or comment
15 which I made during the course of the trial was
16 intended to indicate my opinion as to how you
17 should decide the case or to influence you in
18 any way in your determination of the facts. If
19 at any time I made any comments regarding the
20 facts, you are at liberty to disregard it. At
21 times I asked questions of the witnesses. When
22 I did so, it was for the purpose of bringing out
23 matters which I felt should be brought out and
24 not in any way to indicate my opinion about the
25 facts or to indicate the weight I felt you

1 should give to the testimony of the witnesses.
2 Also, you should not now show prejudice toward
3 a lawyer or his client because I found it nec-
4 essary to admonish the lawyer during the course
5 of the trial. It is the duty of the Court to
6 admonish an attorney who, out of zeal for his
7 cause, does something which is not in keeping
8 with the rules of evidence or the procedure.
9 You are to draw no inference against the side to
10 whom an admonition of the Court may have been
11 addressed during the trial of this case.
12

13 In determining the facts, the jury is
14 reminded that before each member was accepted
15 and sworn to act as a juror, he was asked
16 questions regarding his or her competency,
17 qualifications, fairness and freedom from
18 prejudice or sympathy. On the face of those
19 answers the juror was accepted by the parties.
20 Therefore, those answers are as binding on each
21 of the jurors now as they were then and should
22 remain so until the jury is discharged from con-
23 sideration of this case.

24 You can not decide that you do not like
25 the sections of the law that I will quote to you

Charge

1
2 or any other part of the charge. You have the
3 obligation of accepting the law as I charge it,
4 just as I have the obligation of accepting your
5 findings of facts in your ultimate verdict as to
6 the guilt or innocence of the defendant as to the
7 charge herein.

8 It lends for predictability and stability
9 if judges throughout the country in types of
10 charges such as this, charge uniformly or sub-
11 stantially so and that juries accept it. It would
12 be unfair for you to decide this case on your own
13 notions on what the law should be, and another
14 jury decided it on their own notion on what the
15 law should be.

16 That is why the obligation is a firm one
17 and one that you should understand.

18 Of course, you know by this time that this
19 case has come before you by way of an indictment
20 presented by a Grand Jury sitting in the Eastern
21 District. The indictment charges the defendant
22 with the counts I shall now read to you. Remember
23 the indictment is merely an accusation, merely a
24 piece of paper. It is not evidence and it is not
25 proof of anything.

The indictment reads as follows: The Grand Jury charges:

(1) On or about December 15, 1975, Joseph Setter was indicted by the United States Grand Jury sitting in the Eastern District of New York for violations of the narcotics laws.

(2) On May 26, 1976, the trial of the United States against Joseph Setter, 75-CR-767, commenced in the United States District Court, in the Eastern District of New York before the Honorable Henry Bramwell, the United States District Judge.

(3) On May 26 -- I am going to read it as it should be -- May 26, 1976 through May 27, 1976 the Government presented its direct case in which agents of the New York Joint Task Force of the Drug Enforcement Administration testified inter alia that on April 17, 1975, at approximately five o'clock P.M., Joseph Setter sold approximately one eighth kilogram of cocaine to one, Harvey Rosenberg, at Setter's residence, located at 54-16 Glenwood Road, Brooklyn, New York.

(4) On May 27, 1976 Joseph Setter began his defense case. As part of his defense case

case he called Bernard Meltzer as an alibi witness who was duly sworn by a Clerk of the United States District Court authorized to administer oaths.

(5) It was material to the aforesaid trial to determine whether in fact Joseph Setter was present at the location and time indicated in paragraph 3 above.

Count 1, on May 27, 1976, the defendant, Bernard Meltzer appeared as a witness before the aforesaid Court, and then and there, being under oath as aforesaid, testified falsely before the United States District Court and jury with respect to the aforesaid material matters as follows:

"Question: And do you recall the date April 17, 1975?

"Answer: Yes, I do.

"Question: And do you recall seeing Mr. Setter that day?

"Answer: Yes, I do.

"Question: And where was he that day? Where did you see him?

"Answer: He was on the lot and in the office and in the repair shop.

"THE COURT: He was on the lot and in the

Charge

office and in the repair shop? Is that what you said?

"Answer: Yes.

"Question: And for what period of time was he there that you observed him, from when to when?

"Answer: I was there from 8:30. He was there from about quarter to nine in the morning. And I left at 6:30 and he was still there that evening.

"Question: He was still there?

"Answer: Yes.

"Question: And was he there about a quarter to five on that day?

"Answer: Definitely.

"Question: And he was there at five o'clock?

"Answer: Yes, he was.

"Question: And was he there at five-fifteen?

"Answer: Yes, he was.

"Question: And were you positive of that?

"Answer: Positive.

"Question: And do you recall now that Mr. Setter was present on the premises of Exclusive Motors, would you say from four o'clock

to six o'clock?

"Answer: Yes, he was. He had to make out the payroll for the following day.

"Question: How far -- do you know where Mr. Setter lives?

"Answer: Yes, I do.

"Question: How much of a distance in time away from Exclusive Motors is his house? I think it's Glenwood Road somewheres.

"Answer: Five to ten minutes.

"Question: By car?

"Answer: By car.

"Question: Is it possible Mr. Setter during the course of the day, particularly between four o'clock and six o'clock, could he have disappeared from your plant --

"Answer: No way.

"Question: Exclusive Motors, gone back to his house and stayed at his house for a period of fifteen minutes, which would make a total of fifteen, twenty-five, thirty minutes, could he -- if he had been away for a half an hour -- could he have been away for a half an hour during that period of time?

Charge

"Answer: It was an impossibility during that period of time.

"Question: You would have noticed it?

"Answer: Yes.

"Question: You were in constant observation of him during that period of time?

"Answer: Yes."

The aforesaid testimony of the defendant Bernard Meltzer, as he then and there well knew and believed, was not true in that on April 17, 1975 at approximately five o'clock P.M. Joseph Setter was not present at Exclusive Motors, located at 790 Utica Avenue, Brooklyn, New York. (Title 18, U.S. Code Sec. 1623.)

As to the statute, count 1 of the indictment is based upon Title 18 of the United States Code, Section 1623, which provides in pertinent part as follows:

"Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration shall be guilty of an offense against the laws of the United States."

This section further provides that:

"Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or by other type of evidence."

Offense charged:

Count 1 of the indictment charges that on or about May 27, 1976, in the Eastern District of New York, before this Court, the defendant Bernard Meltzer appeared as a witness duly sworn by a Clerk of the United States District Court authorized to administer oaths, and that Mr. Meltzer knowingly testified falsely before a United States District Court and jury with respect to material matters.

Essential elements of the offense:

The essential elements of the offense charged in Count 1 of the indictment, each of which the Government must prove beyond a reasonable doubt are:

First: That the testimony was given under oath, taken by the accused before a Court sitting in the Eastern District of New York, on the 27th day of May, 1976 as to a material matter

before the Court;

Second: That the testimony so given was false in one or more of the respects charged;

Third: That the full testimony was willfully given and known by Mr. Meltzer to be false when given.

The burden is always on the Government to prove beyond a reasonable doubt every essential element of the crime charged. The fact that one element has been proved does not create an inference that others have been proved. Each must be proved. The law never imposes upon the defendant in a criminal case the burden of calling any witnesses or producing any evidence.

Materiality of testimony:

The materiality of the matter involved in the alleged false testimony is not a matter with which you are concerned, but rather is a question for the Court to decide. You are instructed that the questions asked the accused before the Court on May 27, 1976 as to his knowledge of the location of one Joseph Setter on April 17, 1975 constituted material matter in the proceeding against Joseph Setter described in the indictment. As I have

told you, the third essential element is that the defendant must have acted with a criminal intent. He must have believed that what he swore to was false and he must have had the intent to deceive. If there was a lack of consciousness of the nature of the statement made or if it was inadvertently made, or if there was a mistake of the import, then there was no corrupt motive, that is no criminal intent.

Mere factual error not perjury:

The defendant may not be found guilty of perjury simply because he gives testimony which is factually incorrect. He may have given incorrect testimony because of surprise, confusion, haste, inadvertance, honest mistake as to facts, carelessness or negligence. As has been said, you may not find him guilty unless you find beyond a reasonable doubt that the giving of false testimony was knowing and willful, and that the other elements of the offense are present. As stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged. Also bear in mind that the law never imposes upon a defendant in a criminal

case the burden or duty of calling any witnesses or producing any evidence.

You will note the indictment charges that the offense was committed on or about a certain date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

Please bear in mind the following definitions in considering the essential elements of the crime charged.

"Knowingly": An act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

The purpose of adding the word, "knowingly," was to insure that no one would be convicted for an act done because of mistake, or accident, or other innocent reason.

Definition of "willfully to act":

An act is done willfully if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say,

with bad purpose either to disobey or to disregard the law.

Definition of specific intent:

The crime charged in this case is a serious crime which requires proof of specific intent before a defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent, the Government must prove that a defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made and acts done or omitted by a defendant, and all other facts and circumstances in evidence which indicate his state of mind.

Reasonable doubt:

Now, there are in any case, and in this one, two types of evidence from which a jury may

properly find a defendant guilty of a crime, one is direct evidence such as testimony of an eyewitness, the other is circumstantial evidence which is proof of a chain of facts and circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that before convicting a defendant the jury must be satisfied of the defendant's guilt beyond a reasonable doubt, all the evidence in the case.

A defendant is presumed innocent of the crime.

First, the defendant, though accused, begins the trial with a clean slate and with no evidence against him, and the law permits nothing but legal evidence to be presented before a jury to be considered in support of any charge against the accused. So that the presumption of innocence alone is sufficient to acquit a defendant unless you, the jury, are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

1
2 It is not required that the Government prove
3 guilt beyond all possible doubt. The test is one
4 of reasonable doubt, and reasonable doubt is doubt
5 based upon reason and common sense, the kind of
6 doubt that would make a reasonable person hesitate
7 to act. Proof beyond a reasonable doubt must
8 therefore, be proof of such a convincing character
9 that you would be willing to rely and act upon it
10 unhesitatingly in the most important of your own
11 affairs.

12 You the jury, will remember that a defendant
13 is never to be convicted on mere suspicion or
14 conjecture. The burden is always upon the
15 prosecution to prove guilt beyond a reasonable
16 doubt. This burden never shifts to a defendant.
17 The law never imposes upon a defendant in a
18 criminal case the burden or duty of calling any
19 witnesses or producing any evidence.

20 So, if the jury views the evidence in the
21 case as reasonably permitting either of two
22 conclusions, one of innocence, the other of
23 guilt, you, the jury, should, of course, adopt
24 the conclusion of innocence.

25 I have said the defendant may be proven

1 guilty either by direct or circumstantial
2 evidence. I have said that direct evidence is
3 the testimony one who asserts actual knowledge
4 of a fact, such an eyewitness. Also, circumstantial
5 evidence is proof of a chain of facts and cir-
6 cumstances indicating the guilt or innocence of
7 a defendant. You, the jury, may make common sense
8 inferences from the proven facts.
9

10 It is not necessary that all inferences
11 drawn from the facts in evidence be consistent
12 only with guilt and inconsistent with every reasonable
13 hypothesis of innocence.

14 The test is one of reasonable doubt, and
15 should be based upon all the evidence, the testimony
16 of the witnesses, the documents offered into evidence
17 and the reasonable inferences which can be drawn
18 from the proven facts.

19 An inference is a deduction or conclusion
20 which reason and common sense lead the jury to
21 draw from the facts which have been proved. You
22 are to consider only the evidence in the case.
23 But in your consideration of the evidence you are
24 not limited to the bald statements of the witnesses.
25 On the contrary, you are permitted to draw, from

Charge

the facts which you find have been proved, such reasonable inferences as seem justified in the light of your own experience.

Reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof.

Proof of knowledge and intent:

Knowledge and intent exist in the mind. Since it is not possible to look into a man's mind to see what went on, the only way you have for arriving at a decision in these questions is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question. Direct proof is unnecessary. Knowledge and intent may be inferred from all the surrounding circumstances.

Credibility of witnesses:

You as jurors are the sole judges of the

credibility of the witnesses and the weight their testimony deserves. And it goes without saying that you should scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and his demeanor and manner while on the stand. Consider the witness's ability to observe the matters as to which he has testified, and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; an innocent misrecollection, like failure of recollection, is not

an uncommon experience.

In weighing the effect of discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves. Another test that you can use in determining the truthfulness or credibility of a witness is to use your own good common sense in addition to these essentials that I have given you. You can use your good common sense as you do in your everyday experience where you must make important decisions based upon what others tell you. When you decide to either accept or ignore the statements of others you use your common sense. Your good judgment will say to you somehow or other that whatever they say does not appear to be truthful, that somehow or other you just do not believe what they have said. That is your ability to reason, your ability to determine the truthfulness of the person you are speaking with. Likewise, your common sense should be used

to determine the weight to be given to the testimony of a witness.

You take that same good common sense into the jury room, you do not leave it outside. In addition to what I have said, use your common sense as a test in exercising your good judgment and in determining whether or not this defendant is guilty of the crime charged. It is for you to determine whether the witnesses in this case have testified truthfully, whether or not they have an interest in the case, what that interest may be and how great it is and whether or not they have told you falsehoods. This is all for you to determine.

Every witness's testimony must be weighed as to its truthfulness. If you find any witness lied as to any material fact in the case, then the law gives you certain privileges. One of those privileges is that you have the right to disregard the entire testimony of that witness. If you find, however, that you can sift through that testimony and determine which of the testimony is true and which is false, then the law allows you to take the portions which were true and weigh

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2 it and disregard those portions which were false.
3 That again is within your prerogative.

4 The weight of the evidence is not nec-
5 essarily determined by the number of witnesses
6 testifying on either side. You should consider
7 all the facts and circumstances in evidence to
8 determine which of the witnesses are worthy of
9 greater credence. You may find that the testimony
10 of a smaller number of witnesses on one side is
11 more credible than the testimony of a greater
12 number of witnesses on the other side.

13 You are not obliged to accept testimony,
14 even though the testimony is uncontradicted and
15 the witness is not impeached. You may decide,
16 because of the witness's bearing and demeanor,
17 or because of the inherent improbability of his
18 testimony, or for other reasons sufficient to you,
19 that such testimony is not worthy of belief.

20 The Government is not required to prove
21 the essential elements of the offense as defined
22 in these instructions by any particular number of
23 witnesses. The testimony of a single witness may
24 be sufficient to convince you beyond a reasonable
25 doubt of the existence of an essential element

1
2 of the offense charged, if you believe beyond a
3 reasonable doubt that the witness is telling the
4 truth.

5 When a defendant in a case of this kind
6 takes the stand, which he has a perfect right to
7 do, he is subjected to all the obligations of
8 witnesses, and his testimony is to be treated like
9 the testimony of any other witness. That is to
10 say, it will for you to say, remembering the sub-
11 stance of his testimony, the manner in which he
12 gave it, his cross-examination, and everything else
13 in the case, whether or not he told the truth.
14 Then, again, it is for you to remember, you have a
15 perfect right to consider the interest the
16 defendant has in the case. As he places himself
17 as a witness, he stands like any other witness.

18 You heard testimony by Mr. Meltzer about
19 his plea of guilty to petty larceny and the facts
20 surrounding that plea. You may consider that
21 evidence as it may affect the credibility of the
22 defendant as a witness. Such evidence, as it
23 affects the credibility of Mr. Meltzer, must never
24 be considered as evidence of guilt of the crime
25 for which the defendant is now on trial.

Charge

Another purpose for which you may consider this evidence is to show that the act with which the defendant is presently charged did not occur as the result of a mistake or accident on his part or to show that the defendant intended to do the act with which he is charged.

You are emphatically directed that you may not consider evidence of any alleged prior similar acts to prove the character of Mr. Meltzer in order to show that he acted in conformity therewith on the occasion charged in the indictment. To clarify, you may not consider such evidence to show that the defendant had a predisposition to commit the acts charged in the indictment.

Prior inconsistent statements, witnesses other than the accused, evidence that at some other time a witness has said something, or has failed to say something, which is inconsistent with the witness's testimony at the trial, may be considered by the jury for the sole purpose of judging the credibility of the witness; but may never be considered as evidence or proof of the truth of any such statement.

Impeachment, inconsistent statements or

conduct:

The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his present testimony. The earlier contradictory statements are admissible only to impeach the credibility of the witness, and not to establish the truth of these statements. It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has been impeached.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such a witness's testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

An act or omission is knowingly done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Testimony of Federal officials:

In this case these are New York City policemen who are members of the New York Joint Task Force of the Drug Enforcement Administration.

The probable truthfulness and believability

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2 of every witness is for you, and for each of you
3 to decide; that I have already instructed you.
4 The fact that such witnesses come before you as
5 Government agents should not in the least change
6 your attitude in this respect. Their testimony
7 does not deserve the greater or lesser believability
8 simply because of their official status.

9 Whether you do, or do not, believe any
10 witness must depend upon how truthful you judge
11 that witness to be after you have heard the
12 testimony and formed your own conclusions as to
13 the witness's believability.

14 All evidence, all available evidence need
15 not be produced:

16 The law does not require the prosecution to
17 call as witnesses all persons who may have been
18 present at any time or place involved in the case,
19 or who may appear to have some knowledge of the
20 matters in issue at this trial. Nor does the law
21 require the prosecution to produce as exhibits all
22 papers and things mentioned in the evidence.

23 However, in judging the credibility of the
24 witnesses who have testified, and in considering
25 the weight and effect of all evidence that has been

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2 produced, the jury may consider the prosecution's
3 failure to call other witnesses or to produce other
4 evidence shown by the evidence in the case to be
5 in existence and available.

6 The jury will always bear in mind that the
7 law never imposes upon a defendant in a criminal
8 case the burden or duty of calling any witnesses
9 or producing any evidence, and no adverse inferences
10 may be drawn from his failure to do so.

11 Evidence in the case, stipulations,
12 inferences permitted:

13 Statements and arguments of counsel are
14 not evidence in the case, unless made as an admission
15 or stipulation of facts. When the attorneys on both
16 sides stipulate or agree as to the existence of a
17 fact, you must, unless otherwise instructed, accept
18 the stipulation as evidence, and regard that fact
19 as proved.

20 Unless you are otherwise instructed, the
21 evidence in the case always consists of the sworn
22 testimony of the witnesses, regardless of who may
23 have called them; and all exhibits received in
24 evidence, regardless of who may have produced them;
25 and all facts which may have been admitted or

Charge

stipulated; and all facts and events which may have been judicially noticed; and all applicable presumptions stated in these instructions.

Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded.

Unless you are otherwise instructed, anything you may have seen or heard outside the courtroom is not evidence, and must be entirely disregarded.

You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in the light of experience.

Stipulations entered into in this case:

(continued next page)

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Charge-The Court

In this case the parties have entered into one stipulation which is in agreement as to certain facts.

It is that the transcript from which the testimony of the Defendant was read is a true and accurate transcript of the trial of Joseph Setter at which Mr. Meltzer was a witness under oath.

Judging the evidence:

There is nothing peculiarly different in the way a jury should consider the evidence in a criminal case, from that in which all reasonable persons treat any question depending upon evidence presented to them. You are expected to use your good sense; consider the evidence in the case for only those purposes for which it has been admitted, and give it a reasonable and fair construction, in the light of your common knowledge of the natural tendencies and inclinations of human beings.

If an accused be proved guilty beyond a reasonable doubt, say so. If not so proved guilty, say so.

Keep constantly in mind that it would be a violation of your sworn duty to base a verdict of guilty upon anything other than the evidence in the

Charge-The Court

case; and remember as well that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence. The jury's recollection controls. If any reference by the Court or by counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

Punishment: Now, under your oath as jurors you cannot allow a consideration of the punishment which may be imposed upon the Defendant, if convicted, to influence your verdict in any way or in any sense enter into your deliberations.

The duty of imposing sentence rests exclusively upon the Court. Your function is to weigh the evidence in the case and to determine the guilt or innocence of the Defendant solely upon the basis of such evidence and the law.

You are to decide the case upon the evidence, and the evidence alone, and you must not be influenced by any assumption, conjecture, or sympathy, or any inference not warranted by the facts until proven to your satisfaction.

Exclude sympathy and antipathy:

Charge-The Court

In reaching your verdict, you are not to be affected by sympathy or antipathy for any of the parties, what the reaction of the parties or of the public to your verdict may be, whether it will please or displease anyone, be popular or unpopular or indeed, any consideration outside of the case as it has been presented to you in this courtroom.

You should consider only the evidence, both the testimony and the exhibits, find the facts from what you consider to be the believable evidence, and apply the law as I now give it to you to those facts. Your verdict will be determined by the conclusion thus reached, no matter whom the verdict helps or hurts.

Unanimous verdict:

(Continued on next page.)

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Now, in this type of case there must be a unanimous verdict, that means all twelve of you must agree, and it goes without saying that it becomes incumbent upon you to listen to one another and to argue out the points among yourselves in order to determine in good conscience whether your fellow jurors' argument is one commensurate with yours or whether at least you can with good conscience agree with him. You have no right to stubbornly and idly sit by and say, "I am not talking to anyone," "I am not going to discuss it," because people with common sense and the ability to reason must communicate, they must communicate their thoughts. So, anything which appears in the record and about which one of you may not agree, talk it out amongst yourselves and then if you can't agree as to which is in the record well, you can ask the Court to have that portion of the testimony read back to you. You may do so by knocking on the door and giving a note in writing to the United States Marshal who will then present it to the Court and I will bring you into the courtroom.

The Foreman will preside over your deliberations and will be your spokesman here in Court. The verdict will be not guilty or guilty.

2 1 At this time the alternate jurors may be
2 discharged. All right, the alternate jurors may
3 go and take your things and go to the central jury
4 room on the first floor. You are discharged with
5 the thanks of the Court. Thank you for your help
6 and cooperation in connection with this case. You
7 may leave.

8 (At this point the alternate jurors leave
9 the courtroom.)

10 THE COURT: I wish to state further to the
11 jury, I will send in for you during your delibera-
12 tions a copy of the indictment, all of the evidence.
13 I will speak to the lawyers at the side bar now.

14 (A side bar discussion.)

15 THE COURT: Is there any objection?

16 MR. KELLY: I have no objections.

17 MR. GOULD: I have no objections.

18 THE COURT: I think the jury should be told
19 that there is no inference that this defendant was
20 in any way involved with the drug case or the drugs
21 or anything involving Mr. Setter concerning those
22 drugs.

23 MR. GOULD: I object. The truth is your
24 Honor, the Government does have an inference he was
25 involved. I did not argue it to the jury, nobody

3 1 did. The Government does have an inference that he
2 was involved, but nobody has argued that to the
3 jury.

4 THE COURT: There is no proof.

5 MR. GOULD: That is why I did not argue it.

6 THE COURT: I think the jury should be told
7 this in fairness to the defendant.

8 MR. GOULD: I don't think that it's fair
9 because we don't know one way or the other.

10 THE COURT: We know there is no proof.

11 (The Court addressing the jury.)

12 THE COURT: Ladies and gentlemen, there is
13 one further item the Court must tell you. As far
14 as the case of the United States v. Joseph Setter,
15 Bernard Meltzer was only a witness. Now, there is
16 no proof or there is no knowledge of anyone at all,
17 that he in any way was involved in what Mr. Setter
18 was doing or in the drug business that Mr. Setter
19 may be involved in. So, this is not something that
20 should enter into your deliberations when you are
21 deliberating on this case.

22 Would you swear in the marshals.

23 (The marshals are sworn in by the Clerk of
24 the Court.)

25 THE COURT: The jury may retire for delibera-

4 1 tions and the marshals will take you out.

2 (At this point the jury leaves the court-
3 room.)

4 THE COURT: Exhibit No. 1 was just a request
5 for fresh air, so I didn't even bother to tell you
6 about it. This is Court Exhibit No. 2. We would
7 the minutes on interview with Palmieri detective
8 and Meltzer at Exclusive Auto Sales. Reference,
9 conversation regarding which came first, Meltzer's
10 recollection of 4-17-75 or looking at job cards
11 first to refresh memory.

12 MR. GOULD: That would be Detective Palmieri's
13 testimony. I don't know where that is.

14 THE COURT: That will have to be gotten first
15 and then we can bring them out. Here is what I have
16 in mind Mr. Kelly. They have to dog their stuff
17 out. Then after it is read to them, it takes some
18 time for them to work it out. I was thinking we
19 can see if they would want to go home now and
20 tomorrow morning we do the readback and they have
21 all the time in the world to work it out, rather
22 than rush them. You see, they are liable to rush
23 and decide for him.

24 MR. GOULD: At this point, your Honor, maybe
25 instead of suggesting it to them, say if you feel

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you would like to go home just let us know, but without saying one way or the other.

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MR. KELLY: Maybe you can clarify first what they want. Do they want anything said at the Setter trial or testimony of Detective Palmieri, cross and direct, direct and cross, and Mr. Meltzer's testimony direct and cross with respect to what happens when they left. If you can clarify that first.

THE COURT: Let's first clarify that and then I will see what they want to do. Bring them in.

(At this point the jury enters the courtroom.)

THE COURT: Ladies and gentlemen, I will first read to you Court Exhibit No. 2. It says we would like the minutes on interview with Palmieri detective and Meltzer and Exclusive Auto Sales. Reference, conversation regarding which came first, Meltzer's recollection of 4-17-75 or looking at job cards first to refresh memory. This is from Mr. Newman (ph.) the Foreman.

Now, do you want the reading of Palmieri and Meltzer or just Palmieri? Is it Palmieri and Meltzer?

MR. FOREMAN: Your Honor, we are -

THE COURT: Do you want the rereading of

6 1 Palmieri and Meltzer or just Palmieri, is it one
2 or both?

3 MP. FOREMAN: I would say both.

4 THE COURT: Well, I can give you both. The
5 other thing is this: They are digging it out and it
6 may take time. The Court was considering that
7 perhaps the jury could go home and in the morning
8 we will reread this testimony and then you will
9 deliberate. Would you want to do that or would you
10 rather have the reading now and the deliberations
11 now? There would be no imposition on the Court and
12 no imposition on you. You would have to go home
13 and all of you come back tomorrow. Now, do you have
14 any idea as to that? Would you want to do it all
15 tonight? Do you want to go in and talk that out?
16 Go in and talk that out and come back.

17 (At this point the jury leaves the courtroom.)

18 MR. GOULD: Your Honor, we have also located
19 all the pages in the first trial in which there was
20 testimony by Meltzer regarding the detectives. I
21 don't think the jury was clear as to whether they
22 wanted to hear the testimony from the first trial
23 or --

24 THE COURT: When they come back I will ask
25 them. Mr. Gould, did the Detective Palmieri testify

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at the first trial?

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MR. GOULD: No.

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THE COURT: Then he is not in there.

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MR. GOULD: I am talking about Meltzer
testifying.

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THE COURT: This is Palmieri and Meltzer. And
as I see it, it is confined to this trial.

8

MR. GOULD: Can we ask whether they said --

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THE COURT: I am not going to ask them some-
thing that is not here. Mr. Kelly, do you want me
to ask them if they want Meltzer's testimony from
the first trial?

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MR. KELLY: Judge, we have relocated that,
if they want it, but it seems to be the thrust of
their note is that they want Palmieri, I think
direct and cross and Meltzer direct and cross at
this trial.

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THE COURT: That is what they want from this
case.

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MR. GOULD: Didn't it say anything in that
note that I see about that case? Mr. Meltzer testi-
fied about the discussions between Himself and the
Detective Palmieri at the first trial.

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THE COURT: One of those got into the record
for this case, that was read into the record --

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1 MR. GOULD: Yes, your Honor.

2 THE COURT: Then whatever is part of the
3 record for this case can be read. I thought you
4 were talking about reading from the prior case.

5 MR. GOULD: It was read in.

6 THE COURT: Whatever is part of the record
7 can be read.

8 (At this point the jury enters the courtroom.)

9 THE COURT: What is your decision?

10 THE FOREMAN: Your Honor, we have agreed that
11 the testimony be read tomorrow morning.

12 THE COURT: Thank you. Now you may leave
13 for the day. You are still on trial. Now, while
14 you are away from the courtroom you are ordered not
15 to discuss this case with anyone on or off the jury.
16 Now, it is for 10:00 o'clock tomorrow morning.
17 Now, when you come in you are not to deliberate
18 until after the Clerk has brought you into the
19 courtroom and then you go back in the jury room. You
20 are not to deliberate any more on this case until
21 you return and you have come into the Court, and then
22 you will go back to deliberate. So, it is 10:00
23 o'clock and be here on time and we will start on time.
24 We will have the record for you. They will read it
25 back. They will start to read back and you will have

all day after that. Thank you. Good night. Be here at 10:00 o'clock tomorrow morning.

MR. KELLY: Just a moment. Could you clarify again what the jury, exactly what they want.

THE COURT: Well, you want all of Meltzer's direct and cross examination on the interview with Palmieri and Exclusive Auto Sales, is that what you want, all of Meltzer's testimony and Palmieri's testimony?

THE FOREMAN: Yes.

THE COURT: Thank you. Good night.

(At this point the jury leaves the courtroom.)

MR. KELLY: Judge, it is my understanding that this jury wants the testimony at this trial pertaining to the meeting between Detective Palmieri and Mr. Meltzer. They want the direct testimony of Detective Palmieri, the cross-examination and any redirect and they want the direct examination of Mr. Meltzer with respect to his meeting with Detective Palmieri and any cross-examination. Now Mr. Gould seems to think they also may want those portions of the other trial that were read into the record and have to do with some meeting.

THE COURT: Well, we will give it to them. What is the difference though, it is in.

10 1 MR. KELLY: Well, it seems to me they don't
2 want what was said at the other trial, but this
3 trial.

4 MR. GOULD: That is hard for me to understand.

5 THE COURT: As of now, it is my inclination
6 to give them everything that is in the record on
7 this trial, whether it was read in or stated. It is
8 my inclination at this point.

9 MP KELLY: Then we will locate those portions.

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1 UNITED STATES DISTRICT COURT
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3 EASTERN DISTRICT OF NEW YORK

4 -----
5 UNITED STATES OF AMERICA, :

6 -against- :

7 BERNARD MELTZER, :

8 Defendant. :

76-CR-484

9 -----x

10 United States Courthouse
11 Brooklyn, New York

12 January 20, 1977

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15 B e f o r e :

16 HONORABLE HENRY BRAMWELL, U.S.D.J.
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19
20
21
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23

24 CHERYL FREY
25 ACTING OFFICIAL COURT REPORTER

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APPEARANCES:

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DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

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6

BY: DAVID GOULD, ESQ.
Assistant U.S. Attorney

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EDWARD KELLY, ESQ.

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Attorney for Defendant

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MR. GOULD: We have located the cross and I have the page numbers on the cover that was read in at the beginning.

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THE COURT: Let the reporter read it.

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MR. GOULD: Page 11, Mr. Kelly and I have reviewed page 11-15.

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MR. KELLY: We will have the reporter read first the direct testimony of Mr. Meltzer at this trial with respect to his meeting with Detective Palmieri and the cross-examination by Mr. Gould with respect to Mr. Meltzer's meeting with Detective Palmieri. I would suggest that that be read to the jury and then the jury be asked if they want any more. If they want any more, then I think we should get into the portions of the record at the last trial. But I am still not sure.

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THE COURT: The direct and the cross?

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MR. KELLY: It is still my view they only want the direct and cross from this trial.

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MR. GOULD: Number one, that is not my view. But secondly --

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THE COURT: We will read that and then see what the jury wants.

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MR. GOULD: Secondly, your Honor, it is clear from the Second Circuit law that it is obviously

4 1 discretionary for a court to also read to the jury
2 unless they don't want it and they specifically
3 say they don't want to hear it, things to make the
4 record complete. What they are doing here is com-
5 paring his statement as to what Detective Palmieri
6 did versus Detective Palmieri's statement, what he
7 said and what he said at the first trial, which was
8 not totally what he said at this trial.

9 THE COURT: Let's see what the jury says.

10 MR. GOULD: Whether they want his testimony
11 at the first trial and at this trial?

12 THE COURT: Let's see what they say. We will
13 read the direct and cross and see whether they want
14 more.

15 MR. GOULD: I think your Honor that that is
16 not posing them with the question. I think we ought
17 to ask them right off the bat if they want both.

18 THE COURT: Let's read it first. Let's read
19 it first. Let's go ahead.

20 MR. GOULD: Well, it will take one minute.

21 THE COURT: I am going to go ahead. That is
22 what I am going to do.

23 (At this point the jury enters the courtroom.)

24 THE COURT: Ladies and gentlemen, we are going
25 to get a rereading of Mr. Meltzer's direct and cross

5 1 examination from this trial. There is also from
2 the prior trial for this same situation, there is
3 also some testimony. If you want that we will
4 read it to you, but we will get his direct and
5 cross first.

6 (The record read.)

7 THE COURT: We also have from the first
8 trial Mr. Meltzer's testimony on this particular
9 issue. Do you want a readback on that?

10 THE JURY: Yes.

11 THE COURT: Give them the readback from the
12 first trial.

13 (Record read.)

14 THE COURT: That is it. The jury may retire
15 for deliberations.

16 (At this point the jury leaves the courtroom
17 and retires for deliberations.)

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CERTIFICATE OF SERVICE

March 18, 1977

I hereby certify that a copy of this [REDACTED]
appendix has been mailed to the United States Attorney
for the Eastern District of New York.

J. Nathan Hilbermann